STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STANLEY GNYP,

Defendant-Appellant.

UNPUBLISHED
August 23, 2002

No. 232898
Wayne Circuit Court
LC No. 00-001936

Before: White, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of unarmed robbery, MCL 750.530, and one count of carjacking, MCL 750.529a. He was sentenced to one to fifteen years for each of the unarmed robbery convictions, and forty-two months to fifteen years for the carjacking conviction. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On the evening of January 15, 2000, defendant was arrested when police discovered him in a car that was reported carjacked. Shortly after, an officer showed an array of photographs including a photograph of defendant to the two complainants of a carjacking that had occurred early in the morning of January 15. At that point, defendant was being detained in jail and had been interrogated, but was not yet charged. The officer provided defendant with an attorney, and the attorney approved the use of a photographic showup and the particular array. The officer conducting the showup testified that a superior told him that there were not enough white males for a live lineup. Counsel argued that defendant, a white male, was the only individual in the array wearing a blue hooded sweatshirt, which the complainants had previously described one of their carjackers as wearing.[1] As a result of the showup, one of the complainants picked defendant as one of the two perpetrators.

The trial court conducted a *Wade*[2] hearing and incorporated it into the trial. After the hearing, the court found that while defendant was in custody, which would ordinarily require a

[1] The photographic array does not appear in the record before us. One of the complainants testified at trial that he identified defendant in the array because of defendant's face, not his sweatshirt.

[2] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

lineup, the showup was proper because the officer testified that he was told that there were not enough individuals available for a lineup. Further, the trial court found that the photographs were similar enough to preclude suggestiveness, and that two of the persons in the array were wearing blue hooded sweatshirts. Based on this evidence and additional trial testimony, the trial court convicted defendant.

A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous; that is, the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J.), 318 (Boyle, J., concurring in part and dissenting in part); 505 NW2d 528 (1993).

We do not agree with defendant that the showup was unnecessary. When an accused is in custody or can be compelled to appear, identification by photographic showup generally should not be made unless a legitimate reason for doing so exists. *Id*. at 298, 318; *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995). However, the police officer in this case cited some of the proper circumstances that justify use of a showup – that it was "not possible to arrange a proper lineup" because there was an "insufficient number of persons available with the defendant's physical characteristics." *People v Davis*, 146 Mich App 537, 546; 381 NW2d 759 (1985) (quotation and citation omitted). Furthermore, while defendant was in custody, his counsel was present at the showup and approved selection of the array. *Kurylczyk*, *supra* at 298, 301, 318; see also *People v Hider*, 135 Mich App 147, 151; 351 NW2d 905 (1984). Thus, the trial court's findings on this issue were not clearly erroneous. See *Kurylczyk*, *supra* at 303.

Moreover, we do not agree with defendant's argument that the showup was unduly suggestive in part because defendant was the only individual wearing a blue hooded sweatshirt as the complainants had described the perpetrator wearing. A photographic identification procedure can be so suggestive as to deprive the defendant of due process. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). "The fairness of the identification procedure must be evaluated in the light of the totality of the circumstances." *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). The test is whether the procedure was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. *Kurylczyk*, *supra* at 306, 318. Factors to consider include the opportunity of the witness to view the criminal at the time of the crime, "the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id*. Physical differences in the subjects of the photographs, where there are other indicia of reliability, do not necessarily invalidate a showup. *Id*. at 304-305, 309.

In the present case, we will not disturb the trial court's credibility determination that the police officer handling the showup believed that under the circumstances, a showup was necessary because he did not have enough similar individuals for a lineup. *Id*. at 303; *Lee*, *supra* at 626. Further, the showup was not so impermissibly suggestive as to have led to a substantial likelihood of misidentification. *Kurylczyk*, *supra* at 306. The array consisted of white males like defendant, and two (including defendant) wore blue hooded sweatshirts as the complainants had described the perpetrator wearing. The trial court found that even apart from these characteristics, the men pictured shared similar physical features so that defendant did not appear to be unique. *Id*. at 304-306, 309. In addition, the witnesses had a good opportunity to identify their carjackers, described them adequately and with certainty, and made the identification about

one day after the crime occurred. *Id*. at 306. Therefore, the trial court's findings were not clearly erroneous. See *id*. at 303.

Affirmed.

/s/ Helene N. White
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell